

June 8, 2012

Bill Orlove, District 1 Commissioner
City of Boynton Beach
100 East Boynton Beach Blvd.
Boynton Beach, FL 33425

Re: RQO 12-032
Misuse of Office/Expense Accounts

Dear Commissioner Orlove,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on June 7, 2012.

YOU ASKED in your e-mail submission on April 19, 2012, whether the Palm Beach County Code of Ethics regulates or prohibits you, as an elected official of the City of Boynton Beach (the City), in receiving a monthly expense allowance, established by the City Commission by resolution and contained in the City personnel policy manual, *to cover travel and expense expenditures made in the performance of their official duties*. You also asked whether a record of these expenditures should be submitted by the City Commissioners for purposes of transparency.

Additionally, you asked whether you can use a portion of the expense stipend to make charitable contributions supporting non-profit organizations within the community, including a school that employs your wife.

IN SUM, an official may not use his or her official position to obtain a special financial benefit for him or herself, a spouse or domestic partner or their outside business or employer, as well as a number of additional persons or entities with whom the official has some financial or fiduciary relationship. In addition, an official may not use their official position to obtain any benefit, for any person, if done corruptly.

A government body may transparently resolve to advance travel and other expenses to the Mayor and City Commissioners, incurred in the performance of their official duties. However, if the expense funds are used for personal benefit and not in the *performance of official duties*, such use may constitute a financial misuse of office or a corrupt misuse of office, depending upon the facts and circumstances.

Lastly, as neither you nor your spouse are officers or directors of a non-profit organization, use of expense funds would not violate the misuse of office section specific to those conflicts. The COE cannot opine as to whether such donations would violate City ordinance, policy or procedure. However, donations to a non-profit that employs your spouse may violate the prohibition against using your official position to specially financially benefit the *employer or business* of your spouse.

THE FACTS as we understand them are as follows:

You are an elected City Commissioner of the City of Boynton Beach (the City). In 2002 the City Commission authorized by resolution that *the Mayor and City Commission each receive a monthly allocation to cover expenses incurred in the performance of their official duties*.¹ The City Resolution is not limited to travel and

¹ City of Boynton Beach Resolution No. 02-097

related expenses. While, the allowance is further codified under the City Personnel Policy Manual,² the policy reference is contained within the *Travel Reimbursement* section of the manual. The City Resolution allowance is an allocation and not a reimbursement of travel and related expenses as authorized by State Statute.³

Neither the Resolution nor City policy requires that these expenses be reported. The monthly gross amount allocated to your expense account is \$593 which comes to \$7,117 annually. There is no mechanism for monies not expended under this Resolution to be returned. Each Commissioner receives approximately \$1,300 per month gross salary⁴ in addition to the expense allowance. According to the information you provided, both the salary and the advance expense allowance constitute taxable income.

Your staff researched whether other Florida public agencies had an advance expense allowance similar to the City. Five municipalities responded and none had a monthly advance expense allowance. The responding cities reimburse travel and related expenses on a per diem basis in accordance with §112.061, Florida Statutes, which is similar to how the City deals with its staff employees.

In the interest of transparency you personally file a monthly report with the City Clerk showing how your expense account is used. To your knowledge, you are the only elected official in the City to do so. As previously indicated, there is no ordinance or policy requirement to file such a report.

It is your understanding that the expense account can be used for any activity that involves you in your official capacity as an elected official. There are no specific guidelines in either Resolution 02-097 or the City Personnel Policy Manual as to what constitutes *official duty* or a *public purpose*. You understand a *public purpose* to mean meals purchased when meeting with City staff, registered lobbyists, other elected officials or a constituent to discuss City business or issues. In addition, from time to time you may use the account by making donations in support of non-profit organizations in your community. Neither you nor your spouse is a director or officer of these non-profit organizations, however, you have donated a portion of this stipend to your wife's school, located in the City, to provide books for students and to assist children who want to attend the annual safety patrol trip to Washington, DC. You have been advised by the City Attorney that your practice is permitted under the City's ordinance and personnel policy manual.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the revised Palm Beach County Commission on Ethics Ordinance and Code of Ethics, which took effect on June 1, 2011:

The Commission on Ethics is *authorized to review ordinances...relating to ethics in government and report and make recommendations to the Board of County Commissioners and municipal elected officials as it deems appropriate*.⁵ In this context, the COE will review City Resolution 02-097.

Section 2-443(a) prohibits you from using your official position or office in a manner which you know or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, for yourself, a relative, spouse or domestic partner or their outside business or employer, and a number of other persons or entities with whom you may have a financial or fiduciary relationship. Likewise, section 2-443(c) prohibits participating and voting on an issue where such

² B. Expense Allowance for Public Officials:

1) Public Official shall receive, in lieu of reimbursements, a monthly expense allocation to cover travel and expense expenditures. The amount of expense allocation shall be established, and may be amended, by resolution of the City Commission.

³ §112.061, Florida Statutes, authorizes reimbursement of per diem and travel expenses of public officers

⁴ The Mayor's salary is approximately \$1,500 per month

⁵ §2-258. Powers and duties.

a conflict exists. Using your official position to contribute public funds to your wife's employer may violate the misuse of office sections of the Code.

Activities related to your official position may be broadly interpreted, and decisions by governing bodies, where there is transparency and public input, will rarely be disturbed. For example, the City Commission can vote on a resolution to provide a salary to the Mayor and Commissioners.⁶ However, section 2-443(b), *corrupt misuse of office*, would apply to a situation where an official or governing body uses their official position to *corruptly secure or attempt to secure a special privilege, benefit or exemption* for themselves or any other person. Corruptly means done with a wrongful intent and for the purpose of obtaining any benefit which is inconsistent with the proper performance of their official duty.⁷ Absent a factual scenario that would support such a corrupt intent, City officials are permitted to transparently make such salary and expense decisions without violating the financial misuse or voting conflicts section of the code.⁸

Where there is no guidance as to what constitutes an *official duty* or a *public purpose*, a commissioner runs the risk of violating the misuse of office sections of the Code. Based on the facts and circumstances you submitted, the City Resolution does not define *performance of official duties* or *public purpose* in relation to these stipends. Although, to your credit, you have taken it upon yourself to submit an accounting of expenses, there is no such requirement in the City Resolution. In addition, funds not expended are not returned to the City, but retained by the elected officials. Such a practice may violate the Code of Ethics if unspent funds result in a special financial benefit to the official.⁹

Under the current City Resolution, officials run the risk of violating the Code of Ethics as a result of the following: first, *official duties* is undefined and may lead to circumstances which support allegations of misuse; second, there is no transparent accountability as to how these monies are spent, and; third, the retention of unspent monies would appear to be a special financial benefit to the official. While the COE cannot speculate as to facts and circumstances not presented, the process itself lacks transparency and presents an appearance, if not the risk of impropriety.

IN SUMMARY, while an elected body has great discretion as to how public monies are spent, and similar discretion in determining the public purpose of expenditures arrived at through a transparent legislative process, the individual actions of an official are subject to Code of Ethics scrutiny. Unlike a salary, an expenditure stipend designated for the performance of official duties is regulated as to use. Where a process is in place that provides upfront stipends for expenditures for official duties but fails to specify the nature of those official duties, there is a risk that an interpretation by an official is not in compliance with the Palm Beach County Code of Ethics. Likewise, where there is no requirement to account for these expenditures, there is no transparency or accountability built within the process. This is compounded by the fact that unspent expenditure stipends are not required to be returned. Retaining these funds for personal use would appear to constitute a special financial benefit to the official, and potentially be a violation of the misuse section of the Code of Ethics.

Lastly, the prohibition against using your official position to specially financially benefit a non-profit organization is not violated, provided you (or your spouse) are not an officer or director of the recipient organization. The COE cannot opine as to whether or not use of these funds for such a purpose is permissible under your City Resolution. However, the Code of Ethics prohibits you from using your official position to specially financially benefit your spouse's employer.

⁶ Such an ordinance is already in place in the City. City of Boynton Beach Ordinance No. 03-037, also see, §112.313(5), *supra*.

⁷ In Bell, California, public elected officials allegedly appropriated \$5.5 million dollars in salary and benefits for themselves and high ranking city staff, including six-figure salaries for city council members.

⁸ §112.313(5) Salary and expenses.—No public officer shall be prohibited from voting on a matter affecting his or her salary, expenses, or other compensation as a public officer, as provided by law.

⁹ §2-443(a) *Misuse of public office or employment*

This opinion construes the Palm Beach County Code of Ethics ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics. Please feel free to contact me at 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/gal